Supreme Court, U. S.
FILED
MAY 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION;
ELECTRIC AND WATER PLANT BOARD OF THE
CITY OF FRANKFORT, KENTUCKY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY, ET AL., IN OPPOSITION

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May 6, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR THE ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY, ET AL.,[1] IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-21a) is reported *sub nom. Appalachian Power Co.* v.

[1] This brief is filed on behalf of the Electric and Water Plant Board of the City of Frankfort, Kentucky; the City Utilities Com-

FPC, 529 F.2d 342 (D.C. Cir. January 8, 1976). The initial order of the Federal Power Commission dated June 29, 1973 (Pet. App. B 22a-26a), its order of August 22, 1973, modifying its initial order (Pet. App. C 27a-32a) and its order of October 18, 1973, denying rehearing (Pet. App. D 33a-36a) are reported at 49 FPC 1470, 50 FPC 537 and 50 FPC 1120, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. The petition for a writ of certiorari was filed on April 7, 1976.

QUESTION PRESENTED

Whether the Federal Power Commission and the court of appeals properly determined on the basis of uncontested facts that the rate filing of Kentucky Utilities Company was inconsistent with contractual commitments and therefore improper under the authority of the *Mobile-Sierra-Memphis* [2] line of cases.

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mission of Barbourville, Kentucky; the City of Bardstown, Kentucky; Bardwell City Utilities, Bardwell, Kentucky; the Electric Plant Board of Benham, Kentucky; Berea College (providing retail electric service to the City of Berea, Kentucky); the City Utilities Commission of Corbin, Kentucky; the City of Falmouth, Kentucky; the City of Madisonville, Kentucky; the City of Nicholasville, Kentucky; and the Municipal Light and Water Plant of Providence, Kentucky. For convenience these parties are hereinafter collectively referred to as "Cities".

[2] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). For convenience, these cases are hereinafter referred to as *"Mobile"*, *"Sierra"*, and *"Memphis"*, respectively, or *"Mobile-Sierra-Memphis"*, collectively.

STATUTE INVOLVED

The pertinent portions of the Federal Power Act are set forth in the petition for a writ of certiorari (Pet. App. E 37a-41a).

COUNTERSTATEMENT OF THE CASE

This case concerns an unsuccessful attempt by Kentucky Utilities Company (hereinafter referred to as "KU") to increase unilaterally by a filing with the Federal Power Commission (hereinafter referred to as "FPC" or "Commission") pursuant to Section 205(d) of the Federal Power Act,[3] rates established by contracts with eleven of its wholesale for resale customers. The Commission rejected the tendered rate filing, finding that the contracts under which KU serves those customers are fixed-rate contracts which do not permit unilateral rate changes. The Court of Appeals for the District of Columbia Circuit affirmed.

Cities are municipally owned and operated electric utilities, with the exception of Berea College, an educational institution which provides retail electric service in the City of Berea, Kentucky. Cities all purchase their total requirements of electric power and energy at wholesale from KU for resale to their customers at retail, under negotiated contracts which provide in pertinent part:

> "Each month, the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to the Customer during the preceding month or bi-month determined in accordance with rate schedule number WPS-3R, which is made a part of this contract." [4] (e.g. R. 233)

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[3] 16 U.S.C. 824d(d).

[4] The contracts as entered into in 1963 made reference to rate schedule number "WPS-5" rather than "WPS-3R". These contracts

There is no reference to changes in rate, nor mention of any procedure for changing the rate, in the contracts, in the rate schedule, or in the rules and regulations or terms and conditions which are made part of the contracts.

The contracts in issue here were entered into by KU and its wholesale customers commencing in July of 1963, ten months after KU had first filed its wholesale rate schedules with the FPC (R. 341). The most recent was entered into in 1973 (R. 339). The rate contained in the 1963 contracts was one designated "WPS-5".

On August 1, 1965, KU filed with the FPC a rate reduction to Cities, reflected in a new WPS-3 rate. (R. 355-356). On September 10, 1965, the Acting Chief of the Commission's Bureau of Power wrote to KU as follows (R. 557):

> "This will confirm the telephone conversation between Mr. W. H. Skinner of your company and Mr. A. J. Garber of the Commission's staff on September 8, 1965 regarding the proposal contained in your letter of August 20, 1965. The following points were agreed upon:
>
> * * * *
>
> 2. The filing will contain evidence of acceptance of the revised rate by the customers. Such acceptance may be indicated on the company's letters to the customers transmitting the revised rate."

The revised rate referred to in this letter was designated by KU as "WPS-3R". On the same day, September 10, 1965, KU wrote to each of the Cities then under WPS-5 contracts as follows (R. 535):

> "If this change in rate to WPS-3R, for electric service covered under your existing contract with Kentucky Utilities Company, is acceptable, please so indicate its acceptance on the part of your utility system by signing both copies of this letter (which is sent in duplicate) and return the duplicate copy to us. The other copy of letter and copy of Electric Rate Schedule WPS-3R may be attached to and made a part of your existing contract and substituted for the rate schedule called for in that contract."

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were amended by written agreement of both parties in September, 1965, to substitute rate schedule "WPS-3R" for "WPS-5" in those contracts. (R. 238)

At the bottom of those letters, immediately above the space provided for the signature of the wholesale customer was the following statement:

> "Electric Rate Schedule WPS-3R, attached hereto, is accepted as a part of existing contract with Kentucky Utilities Company in place of rate schedule designated therein." (R. 535).

Cities executed the agreements and on October 4, 1965, they were filed with the FPC. (R. 238).

On February 28, 1969, KU submitted to the FPC for filing a unilateral change in the fuel cost adjustment component of its rate to Cities, effecting a rate reduction to Cities. KU's submittal was rejected by the Commission as not permitted under KU's fixed-rate contracts with Cities. The Secretary of the Commission informed KU as follows (R. 559):

> "A review of the agreements that would be affected by the subject filing indicates that they do not contain provisions which would permit a unilateral change to be made therein. It is therefore requested that you provide each of the affected parties with appropriate notification of your intention to revise your company's fuel clause adjustment factor and obtain their agreement with respect thereto. After such agreement has been obtained, you should submit two copies of the proposed revised fuel clause together with an indication of the

customer's acceptance for each of the rate schedules affected by your submittals.

"In view of the foregoing, your submittals tendered with your letter of February 28, 1969 are not being considered as rate schedule filings and are being retained in the Commission's files for information purposes only."

Following receipt of the Secretary's letter, KU wrote to each of the WPS-3R customers on April 2, 1969, informing them of the proposed reduction in the fuel adjustment factor and concluding as follows (R. 516):

"In order that this reduction may be placed in effect with respect to your contract we have, as requested in the Federal Power Commission letter . . . provided space for your signature of acceptance."

Ten of the Cities signed the acceptance letter, but Frankfort did not. By letter of April 21, 1969, KU urged Frankfort to sign the acceptance in order to gain the benefit of the lower fuel adjustment factor. KU concluded as follows (R. 560):

"Inasmuch as the Federal Power Commission is requiring acceptance on the part of the Plant Board, and we must notify them by copy of such acceptance, we will have no alternative to billing the higher fuel adjustment factor."

The ten Cities which signed the acceptance have been billed the lower fuel adjustment factor since 1969. Frankfort, which did not give its written agreement to this change in the contract rate, has been and continues to be billed at the higher fuel adjustment factor. (R. 516).

No other changes were made or attempted to be made by KU in its contract rates to Cities until May 1, 1973, when KU unilaterally submitted to the Commission a filing which would increase its rates to Cities. (R. 433 et seq.). On motion of the Cities, the Commission re-

jected the rate filing insofar as it related to the Cities because of the inconsistency of the higher rates with KU's contractual commitment to the Cities. (Pet. App. B 23a).

On application for rehearing dated July 23, 1973, KU set forth the undisputed history of its rate schedules from the time prior to 1940 when it began to serve the Cities through the time it first filed wholesale rate schedules with the FPC in 1962 and through the filing of the rate schedule now in issue. (R. 653-671). The Commission, however, noted that all of the contracts currently in force were executed after the Company began filing its schedules with the FPC, and determined that Kentucky law and practice during periods prior to 1962 had no relevance to contracts executed in 1963 and thereafter. (Pet. App. 29a). The Commission also noted that in 1965 and 1969 KU secured the consent of its customers before seeking rate adjustments.[5]

Upon review, the Court of Appeals for the District of Columbia Circuit considered KU's arguments that a hearing was required on the applicability of state law and prior practice before the state regulatory commission. In the opinion for the court, Judge Robinson rejected these contentions, stating:

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[5] In this order the Commission did modify its previous determination and allowed the rate filing to proceed on rates in excess of contract demand. On application for rehearing, Cities pointed out that the contracts provided for increases in demand beyond the amounts stated in the contracts upon notice to KU. The Commission accepted this, and the final order of the Commission again provided that the entire rate filing with respect to the Cities should be rejected subject to a Section 206 investigation as to the consistency of the rates with the public interest. (Pet. App. 33a-36a). KU has not raised any issue with respect to the alleged excess of demand over contract amounts in either the court of appeals or this Court.

> "We think the Commission rightly held that state law had no proper role in the process of interpreting the contracts. Each agreement in force when KU filed for the rate increases in issue was executed after the Commission assumed jurisdiction over the sales in question, or after it became evident that the Commission was endeavoring to do so. In each instance the agreement unambiguously designates a fixed rate." (Pet. App. 14a) (footnotes omitted).

In consideration of the legal inapplicability of the prior practice, Judge Robinson concluded that KU presented to the FPC no factual issue for investigation. (Pet. App. 18a).

ARGUMENT

I. The Questions KU Seeks to Have the Court Consider Are Irrelevant to This Case

The first question posed by KU [6] in its petition, while interesting, bears no relationship to the questions actually presented by this case. It assumes, as its premise, that the contracts were entered into when KU's wholesale service was exclusively under the jurisdiction of the Kentucky Public Service Commission. This is simply not so. The Federal Power Commission asserted jurisdiction over KU's rates to Cities in 1962 (R. 662), and KU filed its rates with the FPC in September, 1962 (Pet. 8). The contracts in question were entered into

[6] "Whether . . . an electric utility's filing with the Federal Power Commission of its contracts for wholesale service *which had been entered into when such service was exclusively under the judisdiction (sic) of a state public service commission* (a) terminates that utility's pre-existing rights under state law and the contracts to file unilateral rate changes (unless such rights have been expressly preserved in the contracts), and (b) makes state law thereafter irrelevant to the interpretation of those contracts and subsequent amendments unless expressly incorporated by reference." (Pet. 2, emphasis added).

at various times over the period 1963-1973. These facts are undisputed on this record. Thus, the first question presented by KU, which concerns the effect of state law on electric service contracts entered into when such service was exclusively under state jurisdiction, is simply not presented in this case.

The second question presented by KU, namely, whether a hearing was required to consider so-called "extrinsic evidence," is also irrelevant, since the Commission and the court of appeals considered KU's allegations as to what that evidence would show and remained unpersuaded that it raised any question of ambiguity in the contracts. The facts alleged by KU were uncontested by the Cities. The "extrinsic evidence" KU sought to show related to previous contracts between the parties and to unreported *ex parte* telephone conversations and meetings between KU and FPC staff members in 1965. Assuming the truth of all KU's allegations concerning the meaning of prior contracts, those facts are irrelevant to the interpretation of the subsequent contracts which are the subject of this case. Assuming the truth of all KU's allegations concerning *ex parte* communications with the FPC staff in 1965, there is no way under any interpretation of contract law that KU and members of the FPC staff could by *ex parte* agreement alter the meaning or intent of KU's contracts with the Cities. A hearing for the purpose of adducing such evidence would thus have been meaningless, and the Commission correctly refused to waste its time on such an exercise.

II. The Petition for a Writ of Certiorari Raises No Issue Worthy of the Court's Consideration

The question actually presented in this case involves nothing more than technical contract interpretation. The Federal Power Commission and the Court of Appeals for the District of Columbia Circuit have both determined

that under this Court's decisions in the *Mobile-Sierra-Memphis* cases, the contracts in force at the time of the latest rate filing unambiguously provide for a fixed rate which cannot be unilaterally changed by KU through a rate filing. The court of appeals affirmed the Commission which had rejected KU's rate filing on the ground that the unilateral rate increase was impermissible under the contracts.

The rule established by the *Mobile-Sierra-Memphis* decisions is not in dispute in this case, and it is well-settled. As stated by the Court of Appeals for the District of Columbia Circuit:

> "The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: the contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Richmond Power and Light* v. *FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973).

While it is true that there has been a considerable amount of litigation arising before the Federal Power Commission under the *Mobile-Sierra-Memphis* doctrine in recent years, the central issue in each case has been the existence of a contractual obligation of a utility to maintain a fixed rate. Each case involves interpretation of the contract provisions there in issue. Different contract language naturally gives rise to different conclusions, both as to the utility's contractual ability to unilaterally file a rate increase and as to the ambiguity or lack of ambiguity of the contract on that point. In terms of the general rules of federal law, there is little that can be said beyond what this Court has already determined in the *Mobile-Sierra-Memphis* trilogy, short of taking up individual cases of contract interpretation.

The interpretation of rate contracts "involves matters peculiarly within the area of the Commission's special

competence." *Memphis*, 358 U.S. at 114. The facts upon which KU presented its claim were made known to the FPC and were undisputed by the Cities.[7] In such circumstances, no evidentiary hearing was required because all that remained to be done was for the FPC to draw the appropriate inferences and legal conclusions from undisputed facts. *Anti-Defamation League of B'nai B'rith* v. *F.C.C.*, 403 F.2d 169, 171 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

III. There Is No Inconsistency With Prior Decisions of the Court of Appeals for the District of Columbia Circuit.

Petitioners suggest that the court of appeals decision is contradictory to the holding of other panels of the same circuit. However, the prior cases of the circuit are consistent with the legal principle applied in this case that unambiguous language used in a rate contract may be the basis for summary rejection of a rate filing. In *Sam Rayburn Dam Electric Cooperative* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975) the court of appeals reversed a determination by the FPC that the contracts in issue were *Memphis* type contracts which allowed Gulf States to make unilateral rate filings. In that case the court of appeals considered extrinsic matters to the contract, developed in the record, because the provisions of the contract were "arguably ambiguous." 515 F.2d at 1003. Because all the evidence developed on the record in that case tended to show that *Sierra*-type contracts were intended, the court remanded the case to the FPC with instructions to reject the proposed rate increase.

In the companion case, *Mid-South Electric Coop.* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975), the court of ap-

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[7] These factual contentions of KU were set forth in the Application for Rehearing to the Initial Order of the Commission (R. 327 *et. seq.*).

peals required the FPC to conduct a factual inquiry into the possible subsequent modifications of a *Sierra* contract, by the conduct of the parties after the execution of the agreement. Mid-South Electric Coop there alleged that the quantity of power available to it under the fixed rate contract had been increased by the subsequent modifications. Unlike prior negotiations leading up to an integrated agreement, evidence of subsequent modifications of an agreement is always considered admissible. *Canal Barge Co.* v. *Griffith*, 480 F.2d 11, 24-25 (5th Cir. 1973), *modified* 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3202 (Oct. 7, 1975).

With reference to *Richmond Power & Light* v. *FPC*, 481 F.2d 490, (D.C. Cir. 1973), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *FPC*, 414 U.S. 1068 (1973), the petitioners state that the court "looked at extensive extrinsic evidence in interpreting whether the *unambiguous* language of the contractors involved in those cases permitted unilateral rate filings." (Pet. 34). However, in that case there was disagreement between the parties as to the meaning and intent of contract language specifically referencing the rate level to rate changes permitted by the state regulatory agency. The court of appeals observed that the rates were filed with the FPC before the execution of the contract, and therefore the parties must have been aware of the impending change in ratemaking authority at the time the contract was made. The court pointed to the apparent purpose of incorporating a state regulated rate into a rate contract subject to FPC jurisdiction, which was to avoid discrimination between the wholesale and retail rates.

There is thus no inconsistency between these three cases and the case at bar. Differences in result are due to differences in the contracts and facts presented to the court.

IV. There Is No Conflict Among the Circuits

Petitioners cite *Shell Oil Co.* v. *FPC*, 334 F.2d 1002, 1007 (3rd Cir., 1964) for the proposition that the decision of the Court of Appeals for the District of Columbia Circuit in this case is in conflict with another circuit. In the *Shell* case, the contract between the regulated gas company and its customer contained a "most favored nations" clause which guaranteed the gas company the benefit of any higher price paid by its customer to its competitors in a specified geographic area. The price comparison specified in the contract was based upon several "pertinent factors" including gas quality, delivery pressure and gathering and compressing arrangements. 334 F.2d at 1005. When the regulated company filed for higher rates to be paid by its customers, it justified its filing under the terms of the contract by pointing to another contract with a different customer, the overall terms of which it claimed provided for a higher price, thereby activating the "most favored nations" clause. The customer disputed the company's evaluation of the prices. Naturally, the court held that in these circumstances a factual hearing was required to resolve the disputed factual issue. Here, by contrast, there is no genuine factual dispute. Further, the issue was raised in the *Shell* case in the context of whether the FPC had authority to conduct hearings after accepting the filing of the regulated gas company. There is no similar issue in this case.

V. KU's Complaint With Respect to Section 206 Relief Is Not Properly Raised

KU concludes its petition with an attack on the criteria in the *Sierra* case governing changes ordered by the Commission in fixed rate contracts under Section 206

of the Federal Power Act. (16 USC 824e).[8] No question involving the so-called *Sierra* criteria is raised in this case. The Commission has not here refused to consider a change in KU's rates pursuant to Section 206; indeed, such a hearing was ordered. (Pet. App. 33a-36a). If that avenue of relief has been a "dead end" for KU (Pet. 36), it is not the fault of the Commission, since the Commission has not had occasion to determine whether KU can satisfy these criteria.[9]

While the *Sierra* criteria may well be the next case KU brings to this Court, it is not *this* case.

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[8] The Court there stated that:

> "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory". *Sierra*, 350 U.S. at 355.

[9] The Section 206 investigation and hearing instituted by the Commission's order in this case (Pet. App. 33a-36a) was terminated upon motion of Cities with the consent of KU.

CONCLUSION

Because no substantial issue of federal law has been raised, Cities respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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